

**European Communities and Certain Member States –  
Measures Affecting Trade in Large Civil Aircraft (WT/DS316)**

Communication from the United States:  
Answers to Questions from Brazil

On April 21, 2006, the United States requested the Dispute Settlement Body (“DSB”) to decide that the panel established on July 20, 2005 (the “July 20 panel”) pursuant to the U.S. request for the establishment of a panel circulated in document WT/DS316/2 would also examine the complaint contained in the request for the establishment of a panel circulated in document WT/DS316/6. The United States further requested the DSB to accept the U.S. request for a panel, and to agree that the panel would have the following revised terms of reference:

“To examine, in the light of the relevant provisions of the covered agreements cited by the United States in documents WT/DS316/2 and WT/DS316/6, the matter referred to the DSB by the United States in those documents, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.”

The April 2006 panel request supplements and clarifies the July 20 panel request, including by providing additional detail with respect to measures that were already covered by the first U.S. panel request in order to address certain procedural questions that the EU has raised and thereby eliminate some of the procedural issues for the panel. Therefore, there is overlap in the vast majority of the subject matter of the two panel requests. It would appear to raise substantial systemic and procedural issues if these two panel proceedings were conducted separately.

Thus, as the United States explained at the April 21, 2006 DSB meeting (see attached excerpt from the statement at that meeting), the purpose of the U.S. request is to facilitate the efficient functioning of the dispute settlement system by having the matters in the two requests considered by the same panel. The most efficient way to do that would be to have the matter contained in the April 2006 request considered by the July 20 panel. Merging the two panel proceedings in this manner would be in keeping with past practice by the DSB.

In response to the U.S. request, the delegation of Brazil asked the United States to clarify the following two issues. The United States thanks the delegation of Brazil for the opportunity to engage in a discussion of the issues presented by the U.S. request and for presenting its questions in writing. The United States is pleased to answer Brazil’s questions.

- Q1: Why has the United States preferred to ask for this decision in lieu of activating the provisions of Article 7 of the DSU, which specifically address situations where a party to the dispute wishes panel terms of references other than the standard ones?
- A1: After the DSB established the July 20 panel, the United States and the EC were not able to agree on panelists. Therefore, after consultation with the Chairman of the DSB and the Chairperson of the Committee on Subsidies and Countervailing Measures, the designate

of the Director-General composed the panel on October 17, 2005 (WT/DS316/4). The parties then worked with the panel and the Secretariat to establish the panel's working procedures, which the panel issued on November 9, 2005. It took a substantial investment of time and resources by the parties, the Secretariat, and the panel itself to reach this point. The panel has taken no additional substantive decisions since that time.

In light of this history and effort invested to date in the July 20 panel, it would be inefficient to address the situation through special terms of reference for the new panel, even if the parties were to agree on such special terms of reference. The parties would need to repeat these difficult procedural steps, and the DSB would need to deal with the status of the existing July 20 panel.

In light of these facts, the United States believes the simplest and most efficient approach for addressing the complaint contained in document WT/DS316/6 would be to revise the July 20 panel's terms of reference as set out above. It was not clear to the United States that Article 7 of the DSU provided a means for doing so, however, because Article 7 provides that the parties have only 20 days from panel establishment to agree on special terms of reference. Failing that, the standard terms shall apply. Therefore, in the interests of maximum certainty, the United States decided instead to seek a decision of the DSB.

Q2: What could the implications of this decision be for future cases where, as in Brazil - Aircraft (DS 46) or Chile - Price Bands (DS 207), changes relevant to the measure at issue are put in place after consultations are held, but before the panel is established, or where an amendment to the challenged measure is introduced while the panel is engaged in considering the said measure? Brazil recalls that, in the two cited cases, the Appellate Body considered that the panel had the authority to decide on the measure in dispute without any need of a second panel and modification of the terms of reference. If the DSB takes the decision requested by the United States today, would Members be compelled or stimulated to, in possible future situations similar to the ones just described by Brazil, ask the DSB to establish an additional panel and, later on, to merge the two panels and revise their terms of reference?

A2: The United States does not believe that the proposed decision, if taken by the DSB, would have the implications that Brazil mentions in this question.

The proposed decision would not alter the authority of panels to decide on the measure in dispute, nor would it change the options available to parties when there is disagreement on the measure in dispute. The EC raised numerous procedural questions with respect to the first U.S. panel request, and while the United States considers that it would have prevailed if the panel had addressed those questions, we considered it preferable to simplify what is already an extremely complex dispute by eliminating any basis for the questions at the outset. Nothing about our proposal would prevent a complaining party from choosing a different approach in a different situation; indeed, in different situations

it might be faster and more efficient to litigate such procedural questions. The DSB decision would simply provide a means for addressing the current procedural posture in the situation in this dispute, namely, that there are two panel requests with respect to the same measures. As the United States noted at the April 21, 2006, DSB meeting, there is precedent for this approach, just as there are the precedents that Brazil cited in its question for the approach of litigating procedural issues before a panel.

The United States hopes that these clarifications address Brazil's concerns and will facilitate the DSB's further consideration of the U.S. request. The United States would be pleased to discuss these matters further with any Member.

Excerpt of U.S. statement on item 6(A) at the DSB meeting held on April 21, 2006

- Mr. Chairman, this first subitem concerns the request by the United States for a decision of the DSB, which -- as you have just mentioned -- was circulated to Members in document WT/DS316/5.
- Our written request sets out the reasons why the United States is seeking this decision. Let me take a moment to summarize what we are asking the DSB to do, and why.
- By way of background, Members will recall that on July 20, 2005, the DSB established a panel to examine the U.S. claims regarding the subsidies that France, Germany, the United Kingdom, Spain, and the European Communities have provided and are continuing to provide to Airbus, the European manufacturer of large civil aircraft. That panel was composed on October 17, 2005.
- Shortly thereafter, on October 26, 2005, the EC filed a request for preliminary rulings that raised various procedural objections with respect to the U.S. panel request. In addition, certain member States committed additional new subsidies to Airbus.
- Although none of the objections in the EC's preliminary ruling request had merit, the United States indicated its willingness to hold further consultations with the EC in order to address those concerns, and thereby to simplify matters for the panel. The United States also wished to consult on the new Airbus subsidies.
- Accordingly, the United States filed a further request for consultations regarding the EC and member State measures on January 31, 2006. The United States and the EC held those consultations on March 23, 2006.
- On April 10, the United States filed a further request for the establishment of a panel, following up on those consultations.
- In view of the relationship that I have just outlined between our 2005 panel request and the request filed this month, the United States considers that the efficient functioning of the dispute settlement system would be served if the matters contained in this month's request were considered by the panel established last July.
- The United States therefore decided to ask the DSB to take a decision to that effect, the decision we are now discussing.
- As we noted in our request, the DSB has taken similar decisions in analogous situations. For example, Article 9.1 of the DSU also reflects a policy, in certain circumstances, of having a single panel consider multiple panel requests related to the same matter

whenever it is feasible to do so. And, under Article 9.1, the DSB has in the past taken decisions to refer a subsequently submitted complaint to a previously established panel.

- While Article 9.1 obviously does not apply to the situation before us today, the United States believes that the DSB's experience with that article provides useful guidance. We have drawn upon that experience in structuring our request for a DSB decision.
- We hope that the Members of the DSB will be able to agree to our request, and we thank Members in advance for their support.
- In this connection, we also recognize that the European Communities is facing similar procedural issues in its dispute regarding alleged U.S. subsidies for large civil aircraft, since the EC has established two separate panels relating to the same matter.
- The United States believes that the decision we are seeking today in DS316 would be an appropriate approach for addressing the procedural issues in DS317 as well, and we would be prepared to support such a request by the European Communities.